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KINGSLEY OBI DIKE v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
B [CRIMINAL APPEAL NO: B-05-232-09-2013 (NGA)]
18 MAY 2015

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Trafficking in dangerous drugs – Statement by accused contradicted with cautioned*
C *statement – Whether trial judge properly appreciated defence case – Whether accused had custody and control of dangerous drugs – Whether conviction safe*

CRIMINAL PROCEDURE: *Police investigation – Cautioned statement – Whether investigating officer conducted thorough investigation – Whether accused*
D *furnished necessary information in cautioned statement*

CRIMINAL PROCEDURE: *Statements – Admissibility – Statement by chemist – Whether evidence may be proven by written statement – Whether consent of accused required before witness statement admissible as evidence – Criminal Procedure Code, ss. 172A(5), 172B(2)(vi), (6) & 402B*

E ***EVIDENCE:*** *Expert evidence – Chemist's evidence – Admissibility – Statement by chemist – Whether evidence may be proven by written statement – Whether consent of accused required before witness statement admissible as evidence – Criminal Procedure Code, ss. 172A(5), 172B(2)(vi), (6) & 402B*

F D/Sjn Zulkifli bin Zainal ('SP2'), who was on surveillance duty at the KLIA airport, recovered two aluminium packages containing crystal like substances from the bag that the appellant was carrying ('exh. P5'). Upon analysis by the chemist ('SP3'), the crystal like substances were confirmed to be methamphetamine weighing 2057.9g. The appellant was then charged at the High Court under s. 39B(1)(a) of the Dangerous Drugs Act 1952
G ('DDA'), punishable under s. 39B(2) of the DDA. In his defence, the appellant, who was a student in Malaysia, stated that he had befriended one Hindi, a fellow Nigerian. The appellant contended that he had gone back to Nigeria and upon his return from Nigeria, the appellant transited at Doha, where he bumped into Hindi. Hindi was also returning to Malaysia in the
H same flight as the appellant. Hindi had asked the appellant to check in one of his four bags as he had excess baggage and the appellant agreed to do so. It was also contended by the appellant that all the while he was with Hindi and Hindi was the one who picked the bags including exh. P5. At the end of the defence case, the trial judge found that the evidence of the appellant
I was at variance with his cautioned statement. The contradictions were in respect of whether Hindi was with the appellant at the time the appellant was arrested and whether the meeting with Hindi at Doha airport was a chance meeting. The trial judge concluded that the contradictions put the entire

evidence of the appellant in an unfavourable spotlight and therefore, convicted and sentenced the appellant to death. Hence, the appeal against the conviction and sentence on the grounds, *inter alia*, that (i) the trial judge did not appreciate the defence case; and (ii) the evidence of the chemist was inadmissible. It was submitted for the appellant that trial judge had failed to consider the consistencies of the defence as to the existence of Hindi and the failure of the investigating officer to enquire, from the appellant, Hindi's address or telephone number. The appellant further argued that before a witness statement could be produced, the appellant must agree to the production of the witness statement as provided for under ss. 172A(5) and 172B(2)(iv) and (6) of the Criminal Procedure Code ('CPC').

Held (dismissing appeal; affirming conviction and sentence of High Court) Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The appellant was seen pulling exh. P5 and there was no evidence that Hindi would collect the bag from the appellant at any point of time at KLIA. If Hindi was the one who picked up the baggage from the carousel, it was not probable that the appellant would continue to assume custody and control of exh. P5 until the time that he was detained by the police. More importantly, in his cautioned statement, the appellant mentioned that he was alone when he was arrested, a fact that negated the appellant's version that Hindi was with him in the same flight and that the bag was given by Hindi. (paras 20 & 21)

(2) The appellant could have and would have furnished Hindi's telephone number in his cautioned statement, without being prompted by the recording officer, or without being asked by the investigating officer. In the circumstances, the prosecution could not be blamed for not conducting a thorough investigation on Hindi. It was inherently improbable that SP2 had chosen to ignore Hindi and had not subjected Hindi to the same examination as he did to the appellant, if indeed Hindi was together with the appellant, more so, when Hindi was said to have three bags with him. (paras 26 & 27)

(3) Sections 172A and 172B of the CPC were enacted to facilitate the speedy disposal of criminal cases. However, a trial judge who conducted pre-trial conference and case management under ss. 172A and 172B must adhere to the express provisions stipulated therein. Section 402B of the CPC is similarly designed to facilitate the trial of criminal cases whereby it stipulates that evidence may be proved by written statement, and it is clearly associated with pre-trial conference and case management. As such, s. 402B should be read together with ss. 172A and 172B of the CPC. But even if s. 402B were to stand on its own, it similarly requires the consent of the parties to the proceedings. Parties to criminal proceedings must necessarily mean the accused person and the prosecution. (paras 32 & 33)

(4) On the facts, although it was stated that SP3 had produced the witness statement, SP3 had also testified orally in examination-in-chief on the drug exhibits that he received from the investigating officer. In his oral evidence, SP3 had identified the exhibits concerned and he had stated that he prepared the chemist report. Thereafter SP3 was extensively cross-examined on his analysis of the drugs exhibit. Hence, the court disagreed that SP3's evidence was inadmissible. (para 34)

Bahasa Malaysia *Translation Of Headnotes*

D/Sjn Zulkifli bin Zainal semasa sedang menjalankan tugas pengawasan di lapangan terbang KLIA, menjumpai dua paket aluminium yang mengandungi bahan-bahan kristal dari beg yang dibawa oleh perayu ('eks. P5'). Setelah dianalisis oleh ahli kimia ('SP3'), bahan-bahan kristal tersebut telah disahkan sebagai methamphetamine seberat 2057.9g. Perayu kemudiannya telah dipertuduh di Mahkamah Tinggi di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), yang boleh dihukum di bawah s. 39B(2) ADB. Dalam pembelaannya, perayu yang merupakan seorang pelajar di Malaysia, menyatakan bahawa dia telah berkawan dengan Hindi, rakan senegaranya dari Nigeria. Perayu menghujahkan bahawa dia telah pulang ke Nigeria dan ketika kembali dari Nigeria, perayu telah bertransit di Doha di mana perayu telah bertemu dengan Hindi. Hindi juga berada dalam perjalanan pulang ke Malaysia dengan menaiki penerbangan yang sama. Hindi telah meminta perayu untuk mendaftar masuk salah satu daripada empat begnya kerana Hindi mempunyai lebihan bagasi dan perayu telah bersetuju untuk berbuat demikian. Perayu juga menghujahkan bahawa dia sentiasa berada bersama-sama Hindi dan Hindi adalah orang yang mengambil beg-beg termasuk eks. P5. Di akhir kes pembelaan, hakim bicara mendapati bahawa keterangan perayu bertentangan dengan kenyataan beramarannya. Percanggahan adalah berkenaan sama ada Hindi berada bersama-sama dengan perayu ketika perayu ditangkap dan sama ada pertemuan dengan Hindi di lapangan terbang Doha adalah satu pertemuan secara kebetulan. Hakim bicara membuat kesimpulan bahawa percanggahan tersebut telah meletakkan seluruh keterangan perayu dalam keadaan yang tidak memihak kepadanya dan dengan itu telah menyabit dan menjatuhkan hukuman mati terhadap perayu. Oleh itu, rayuan terhadap sabitan dan hukuman atas alasan-alasan, antara lain, bahawa (i) hakim bicara tidak mempertimbangkan kes pembelaan; dan (ii) keterangan ahli kimia tidak boleh diterima. Ia telah dikemukakan oleh perayu bahawa hakim bicara telah gagal untuk mempertimbangkan konsistensi pembelaan tentang kewujudan Hindi dan kegagalan pegawai penyiasat untuk menyiasat, daripada perayu, alamat atau nombor telefon Hindi. Perayu seterusnya menegaskan bahawa sebelum kenyataan saksi boleh dikemukakan, perayu harus bersetuju dengan pengeluaran kenyataan saksi sebagaimana yang diperuntukkan di bawah ss. 172A(5) dan 172B(2)(iv) dan (6) Kanun Tatacara Jenayah ('KTJ').

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman Mahkamah Tinggi)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Perayu telah dilihat menarik eks. P5 dan tiada keterangan bahawa Hindi akan mengambil beg daripada perayu pada bila-bila masa di KLIA. Jika Hindi adalah orang yang mengambil bagasi dari karusel, adalah tidak perlu bagi perayu untuk terus memikul jagaan dan kawalan terhadap eks. P5 sehingga waktu ditahan oleh pihak polis. Lebih penting lagi, dalam kenyataan beramarannya, perayu menyatakan bahawa dia bersendirian sewaktu ditangkap, satu fakta yang menafikan versi perayu bahawa Hindi berada dalam penerbangan yang sama dengannya dan bahawa beg tersebut diberikan oleh Hindi.

(2) Perayu boleh atau sepatutnya memberikan nombor telefon Hindi dalam kenyataan beramarannya tanpa diminta oleh pegawai rakaman atau tanpa diminta oleh pegawai penyiasat. Dalam keadaan ini, pihak pendakwaan tidak boleh dipersalahkan kerana tidak menjalankan siasatan terperinci ke atas Hindi. Adalah tidak berkemungkinan bahawa SP2 telah memilih untuk mengabaikan Hindi dan tidak melakukan kepada Hindi pemeriksaan yang sama seperti yang dilakukan kepada perayu jika Hindi memang berada bersama-sama dengan perayu, lebih-lebih lagi apabila Hindi dikatakan mempunyai tiga beg dengannya.

(3) Seksyen 172A dan 172B KTJ telah digubal untuk mempercepatkan pelupusan kes-kes jenayah. Walau bagaimanapun, hakim bicara yang menjalankan perjumpaan pra-perbicaraan dan pengurusan kes di bawah ss. 172A dan 172B harus mematuhi peruntukan di dalamnya. Seksyen 402B KTJ juga direka untuk memudahkan perbicaraan kes-kes jenayah di mana ia menetapkan bahawa keterangan boleh dibuktikan dengan kenyataan bertulis dan ia jelas berkait dengan mesyuarat pra-perbicaraan dan pengurusan kes. Oleh itu, s. 402B harus dibaca bersama-sama dengan ss. 172A dan 172B KTJ. Jika pun s. 402B boleh berdiri sendiri, ia masih memerlukan persetujuan pihak-pihak kepada prosiding tersebut. Pihak-pihak kepada prosiding jenayah mesti bermaksud tertuduh dan pihak pendakwaan.

(4) Berdasarkan fakta, walaupun telah dinyatakan bahawa SP3 telah mengemukakan kenyataan saksi, SP3 juga telah memberikan keterangan secara lisan dalam pemeriksaan utama terhadap eksibit dadah yang diterimanya daripada pegawai penyiasat. Dalam keterangan lisannya, SP3 telah mengenal pasti eksibit berkenaan dan dia telah menyatakan bahawa dia telah menyediakan laporan kimia tersebut. Selepas itu, SP3 telah disoal balas secara meluas mengenai analisisnya berhubung dengan eksibit dadah tersebut. Oleh itu, mahkamah tidak bersetuju bahawa keterangan SP3 tidak boleh diterima.

A **Case(s) referred to:**
Naveen Raj Naidu Gunasegaran v. PP & Another Appeal [2015] 3 CLJ 1082 CA ***(dist)***
Soorya Kumar Narayanan & Anor v. PP [2012] 9 CLJ 141 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 172A(5), 172B(2)(vi), (6), 402B
B Dangerous Drugs Act 1952, s. 2

For the appelant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Hamdan Hamzah; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-112-2011]

C *Reported by S Barathi*

JUDGMENT

Tengku Maimun Tuan Mat JCA:

D **Introduction**

[1] The appellant was convicted and sentenced to death by the High Court Shah Alam on the following charge:

> Bahawa kamu pada 5 Januari 2011, Jam lebih kurang 3.30 petang di Kawasan Tuntutan Bagasi F, Balai Ketibaan Aras 3, Bangunan MTB,
E KLIA di dalam daerah Sepang, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah jenis Methamphetamine seberat 2057.9 gram, oleh itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh di hukum di bawah Seksyen 39B(2) Akta yang sama.

F **[2]** The appellant appealed to the Court of Appeal against the conviction and sentence. We heard the appeal at the end of which, we had unanimously dismissed the appeal. Our reasons now follow.

The Prosecution's Case

G **[3]** The appellant was pulling a trolley bag with another sling bag when he caught the attention of D/Sjn Zulkifli bin Zainal (SP2), who was on surveillance duty at the KLIA airport. According to SP2, the appellant looked uneasy and hesitant when the appellant reached the scanning machine.

H **[4]** SP2 approached the appellant, who was travelling from Doha. The appellant was asked to scan the bag. Nothing unusual appeared on the scanner. On a body check, nothing was found on the appellant's body either. SP2 directed the appellant to the Narcotics Office, KLIA for purposes of carrying out further examination on the appellant.

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[5] At the narcotics office, the appellant was asked to open the trolley bag (exh. P5), which had the name tag of the appellant. SP2 saw some clothing inside the bag. SP2 also felt an unusual thickness on both sides of the wall of exh. P5 with traces of the sides being gummed. SP2 prised open the sides and removed two hard paper boards on each side of the bag. From behind the gummed sides, SP2 recovered two aluminium packages (exhs. P54 and P55) containing crystal like substances. Upon analysis by the chemist, Zulkifli bin Mohd Edin (SP3), the crystal like substances were confirmed to be methamphetamine weighing 2057.9 grams.

[6] The defence essentially was that the appellant had no knowledge of the drugs, as exh. P5 was given to him by one Hindi.

[7] At the end of the prosecution's case, the trial judge found that the appellant had custody and control of the bag, exh. P5. The trial judge considered the fact that since the drugs were concealed, there was a possibility that the appellant had no knowledge of the drugs, especially if the bag was given by someone else as contended by the appellant. However, having accepted the evidence of SP2 on his observation that the appellant was seen to be uneasy and hesitant, the trial judge concluded that the conduct of the appellant had given rise to an inference that the appellant had the guilty mind. Applying s. 2 of the Dangerous Drugs Act 1952 to find a *prima facie* case of trafficking, the learned trial judge called upon the appellant to enter his defence.

The Defence

[8] In his evidence given under oath, the appellant, who was a student in Malaysia, stated that he had befriended a fellow Nigerian, called Hindi. Hindi was staying in Segambut, Kuala Lumpur. The appellant had wanted to go back to Nigeria to attend his sister's wedding but he was short of cash. Hindi paid for the appellant's fare. On his return from Nigeria, the appellant transited at Doha. At Doha airport, the appellant bumped into Hindi. Hindi was also returning to Malaysia in the same flight as the appellant. Hindi had excess baggage and had asked the appellant to check in one of his (Hindi's) four bags. The appellant felt obliged. He agreed to help check in one of Hindi's bags, which was exh. P5.

[9] It was further the evidence of the appellant that all the while he was with Hindi. At the carousel, it was Hindi who picked the bags including exh. P5. The appellant stated that his attention was momentarily diverted when he was answering a call on his mobile phone and it was at that point of time that he was stopped by SP2.

A **Findings Of The High Court**

[10] At the end of the defence case, the trial judge found that the evidence of the appellant was at variance with his cautioned statement (exh. D68). The contradictions were in respect of whether Hindi was with the appellant at the time the appellant was arrested and whether the meeting with Hindi
B at Doha airport was a chance meeting.

[11] In his oral evidence, the appellant stated that Hindi was with him in the same plane from Doha to Kuala Lumpur, right up to the time when he was arrested whereas in exh. D68, the appellant said that he was alone when
C he was arrested. As to the meeting at the Doha airport, the oral evidence of the appellant disclosed that the meeting was a chance meeting but in exh. D68, the appellant stated that Hindi had informed the appellant before the appellant left for Nigeria that the appellant would have to bring something back to Malaysia. The learned trial judge concluded that the
D contradictions put the entire evidence of the appellant in an unfavourable spotlight.

The Appeal

[12] Learned counsel raised two grounds of appeal:

E (i) the learned trial judge did not appreciate the defence case; and

(ii) the evidence of the chemist, SP3 was inadmissible.

[13] On the first ground, learned counsel submitted that the learned trial judge erred in his approach. Whilst the learned judge was correct in dealing with the contradictions between the oral evidence and the cautioned
F statement, learned counsel's complaint was that the learned trial judge ought to consider the consistencies as well, which he did not. Learned counsel submitted that the learned trial judge should have considered the core of the defence and in this regard, the defence had been consistent, namely that in both the oral evidence and the cautioned statement, Hindi was mentioned.
G The meeting was a chance meeting at Doha airport and the appellant had mentioned in both his oral evidence and cautioned statement why he checked in exh. P5 for Hindi, the reason being that they were together in the same plane. In support of his submissions, learned counsel relied on the case of *Soorya Kumar Narayanan & Anor v. PP* [2012] 9 CLJ 141 where
H notwithstanding the inconsistencies between the oral evidence and the cautioned statement, the Federal Court considered the core defence of the appellants.

[14] Learned counsel had also submitted that there was a greater duty on the investigating officer to ask questions to the appellant whether the
I appellant knew the address of Hindi in Segambut or whether the appellant had the telephone number of Hindi.

[15] The second ground of appeal concerned the evidence of the chemist, SP3 who had produced his witness statement pursuant to case management (Rekod Rayuan Jld 1: p. 11; Rekod Rayuan Jld 2: p. 111). It was the argument of learned counsel that before a witness statement can be produced, the appellant must agree to the production of the witness statement as provided for under ss. 172A(5) and 172B(2)(vi) and (6) of the Criminal Procedure Code (CPC).

[16] Learned counsel submitted that in the absence of any evidence that the accused agreed to such arrangement, the witness statement was not in compliance with the said provisions, rendering the evidence of the chemist inadmissible in law. In support of the argument, learned counsel cited the case of *Naveen Raj Naidu Gunasegaran v. PP & Another Appeal* [2015] 3 CLJ 1082 (Mahkamah Rayuan, Rayuan Jenayah No. B-05-134 & 135-05-2013).

Findings

[17] Having perused the evidence in totality, we found that the conviction of the appellant was safe.

Whether The Trial Judge Failed To Appreciate The Defence

[18] On the first ground, the complaint of learned counsel was two-fold. The first was in relation to the failure of the learned trial judge to consider the consistencies of the defence as to the existence of Hindi and secondly on the failure of the investigating officer, Inspector Eddy Amin (SP4) to enquire from the appellant, Hindi's address in Segambut or Hindi's telephone number.

[19] We agreed with learned counsel to the extent that the appellant had been consistent in his oral evidence and his cautioned statement on the existence of Hindi and that the appellant met Hindi by chance at Doha airport and that Hindi had asked the appellant to check in the bag exh. P5 as Hindi had excess baggage.

[20] However, the evidence of SP2, which the learned trial judge found to be credible, was that the appellant was seen pulling the trolley bag, exh. P5. In our view, if Hindi had asked the appellant to check in exh. P5 for the reason that Hindi had excess baggage, it was probable to expect Hindi to claim the baggage from the appellant upon arrival at KLIA. In fact the appellant stated in his evidence that Hindi was the one who picked up the baggage from the carousel. If that be the case, it was not probable that the appellant would continue to assume custody and control of exh. P5 until the time that he was detained by the police.

[21] There was also no evidence that Hindi would collect the bag from the appellant at any point of time at KLIA. More importantly, in his cautioned statement, the appellant mentioned that he was alone when he was arrested.

A In our view, the fact that the appellant was alone negated the appellant's version that Hindi was with him in the same flight and that the bag was given by Hindi.

[22] Learned counsel had submitted on the failure of the investigating officer, SP4 to undertake a thorough investigation on Hindi. Learned counsel
B contended that it was incumbent upon the prosecution to test the veracity of the defence version, namely that Hindi, who was the real trafficker, was in the same flight with him. In this regard, learned counsel submitted that firstly, SP4 could have gone to the relevant airline for a copy of the flight manifest to confirm the existence of Hindi in the flight and secondly, SP4
C could have produced the footages of the CCTV as the arresting officer, SP2 had confirmed that there were CCTVs at the place where the appellant was detained.

[23] We agreed with learned counsel on the proposition that the duty lies on the prosecution to investigate the defence version. However, we noted
D from the evidence that the appellant did not immediately inform the police about Hindi when he was arrested. Only when he gave the cautioned statement four days later that he mentioned Hindi. The evidence of SP4 on why he could not obtain the flight manifest was explained below (Rekod Rayuan Jld 2: p. 200):

E
> ... setelah beberapa hari baru rakaman percakapan di ambil Yang Arif. Dan ketika membaca rakaman percakapan itu Yang Arif baru saya sedar kewujudan Hindi Yang Arif yang seperti yang dinyatakan oleh OKT Yang Arif. ... untuk mendapatkan passenger list hanya dalam masa 24 jam ... .

F **[24]** On the CCTV footages, the evidence of SP4 was (Rekod Rayuan Jld 3: p. 202):

> Saya ada ke Pejabat CCTV Yang Arif dan dimaklumkan pada tangkapan itu Yang Arif CCTV tidak memfokus kepada lokasi yang ditangkap Yang Arif, dan saya juga difahamkan Yang Arif pihak MAB Yang Arif beberapa CCTV tidak berfungsi secara baik dan dalam proses pembaik pulih Yang
G Arif. Sebab itu saya tidak mengambil rakaman itu Yang Arif disebabkan imej tidak jelas Yang Arif.

[25] The appellant was in fact asked about Hindi's address in Segambut as follows (Rekod Rayuan Jld 5: p. 517):

H
> S: Di manakah Hindi tinggal?
>
> J: Saya tidak ingat alamat penuhnya cuma apa yang saya ingat dia tinggal di Segambut Kuala Lumpur.

[26] Further, the appellant had stated in his cautioned statement that " ... saya telah berkenalan dengan individu bernama 'Hindi'. Dia adalah lelaki
I warganegara Nigeria dan ketika itu kami selalu berhubung melalui telepon." In our view, if Hindi was not a figment of the appellant's imagination, the

appellant could have and would have furnished Hindi's telephone number in his cautioned statement, without being prompted by the recording officer, or without being asked by the investigating officer. In the circumstances, we were of the view that the prosecution could not be blamed for not conducting a thorough investigation on Hindi.

[27] SP2 had testified as to the events which led to the arrest of the appellant. We found it inherently improbable that SP2 had chosen to ignore Hindi and had not subjected Hindi to the same examination as he did to the appellant, if indeed Hindi was together with the appellant, more so when Hindi was said to have three bags with him. In this regard, the learned trial judge had stated that (Rekod Rayuan Jld 5: p. 467):

> Surely when confronted by the Police even before the recovery of the drugs the normal reaction would be to strenuously deny ownership of the bag.
>
> This brings me to the evidence of the prosecution and the testimony of the raiding officer SP2 which to me is more believable and consistent with the happening of the events at KLIA ... .

[28] We found no reason to disagree with the findings of the learned trial judge.

Whether The Evidence Of The Chemist Was Inadmissible

[29] Learned counsel relied on sub-s. (5) of s. 172A and sub-s. (2)(vi) and (6) of s. 172B of the CPC on pre-trial conference and case management to contend that before the chemist, SP3 can give evidence by way of witness statement, the appellant must have consented to the same. In this case, there was no evidence of such consent by the appellant.

[30] In response, learned deputy submitted that the witness statement of the chemist was governed by s. 402B of the CPC which reads:

> 402B. (1) In any criminal proceedings, a written statement by any person shall, with the consent of the parties to the proceedings and subject to the conditions contained in subsection (2), be admissible as evidence to the like extent as oral evidence to the like effect by that person.
>
> (2) A statement may be tendered in evidence under subsection (1) if:
>
> (a) the statement purports to be signed by the person who made it;
>
> (b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief; and
>
> (c) a copy of the statement is served by or on behalf of the party proposing to tender it, on each party.

[31] Learned deputy contended that the provisions in ss. 172A(5) and 172B(2)(vi) and (6) do not apply to s. 402B of the CPC. Subsection (5) of s. 172A reads:

> (5) All matters agreed upon in the pre-trial conference by the advocate and the prosecution shall be reduced into writing and signed by the accused, the advocate and the prosecution.

Subsection (2)(vi) of s. 172B states:

> (2) At the case management, the Magistrate, Sessions Court Judge or Judge shall:
>
> (vi) subject to the consent of the accused and his advocate, and the prosecution, admit any exhibits;

While sub-s. (6) of s. 172B states:

> Notwithstanding the provisions of the Evidence Act 1950, all matters that have been reduced into writing and duly signed by the accused, his advocate and the prosecution under subsection 172A(5) shall be admissible in evidence at the trial of the accused.

[32] Sections 172A and 172B of the CPC were enacted to facilitate the speedy disposal of criminal cases. Although speed was the consideration, a trial judge who conducted pre-trial conference and case management under ss. 172A and 172B must, in our view, adhere to the express provisions stipulated therein. Subsection (5) of s. 172A provides that all matters agreed upon in the pre-trial conference by the advocate representing the accused and the prosecution shall be reduced into writing and signed by the accused, the advocate and the prosecution. Subsection (6) of s. 172B provides that notwithstanding the provisions of the Evidence Act 1950, all matters that have been reduced into writing and duly signed by the accused, his advocate and the prosecution under s. 172A(5) shall be admissible in evidence.

[33] As with ss. 172A and 172B, s. 402B of the CPC is similarly designed to facilitate the trial of criminal cases. To save time on the taking of evidence, s. 402B stipulates that evidence may be proved by written statement. Clearly this is associated with pre-trial conference and case management. As such, we took the view that s. 402B should be read together with ss. 172A and 172B of the CPC. But even if s. 402B were to stand on its own, it similarly requires the consent of the parties to the proceedings. Parties to criminal proceedings must necessarily mean the accused person and the prosecution.

[34] Having said that, we however, were not able to agree with learned counsel that the evidence of the chemist, SP3 was inadmissible. Although it was stated at the outset that SP3 had produced the witness statement (Rekod Rayuan Jld 1: p. 11), we found that SP3 had also testified orally in examination in chief on the drug exhibits that he received from the investigating officer. In his oral evidence, SP3 had identified the exhibits

concerned and he had stated that he prepared the chemist report, exh. P66 (Rekod Rayuan Jld 2: pp. 112-122). Thereafter SP3 was extensively cross examined on his analysis of the drugs exhibit.

[35] The decision in *Naveen Raj Naidu (supra)* cited by learned counsel was distinguishable. In *Naveen Raj Naidu (supra)*, this court had ordered a retrial as the chemist was not called to give evidence on the dangerous drugs, the subject matter of the charge.

Conclusion

[36] In conclusion, having regard to the evidence in totality, we found that the prosecution had proven the charge against the appellant beyond reasonable doubt. We therefore unanimously dismissed the appeal and we affirmed the conviction and sentence of the High Court.